

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JACK L. FRENCH

Claimant

VS.

UNIVERSAL LUBRICANTS, LLC

Respondent

AND

NEW HAMPSHIRE INS. CO.

Insurance Carrier

Docket No. 1,051,457

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the August 3, 2010, preliminary hearing Order entered by Special Administrative Law Judge E.L. Lee Kinch. Robert R. Lee, of Wichita, Kansas, appeared for claimant. William G. Belden, of Merriam, Kansas, appeared for respondent.

The Special Administrative Law Judge (SALJ) found that claimant sustained compensable injuries to his neck, left shoulder and left arm. Respondent was ordered to pay temporary total disability benefits until claimant is released to substantial gainful employment, and Dr. Patrick Do was authorized to be claimant's physician for all treatment, tests and referrals.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the August 3, 2010, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Although respondent does not deny that claimant suffered personal injury by accident while in its employ on April 23, 2010, respondent contends claimant suffered injuries to his left arm only and did not suffer injuries to his neck or left shoulder. Respondent asks the Board to reverse the findings in the preliminary hearing Order to the

effect that claimant's left shoulder and neck injuries are compensable and vacate the order for payment of temporary total disability benefits and medical benefits in relation to the left shoulder and neck.

Claimant asserts that respondent's appeal should be dismissed for lack of jurisdiction. In the event the Board finds it has jurisdiction, claimant asserts the SALJ was correct in finding that the injuries to claimant's left arm, left shoulder and neck are compensable.

The issues for the Board's review are:

- (1) Does the Board have jurisdiction over the issues in this appeal?
- (2) If so, did the injuries and need for treatment to claimant's left shoulder and neck arise out of and in the course of his employment at respondent?

FINDINGS OF FACT

On April 23, 2010, claimant was injured in Salina, Kansas, while working for respondent as a driver. He was rolling a 700- to 800-pound drum of antifreeze from the back of a truck when the drum got caught in a hole in the floorboard. This caused claimant to lose his grip, and the drum started to fall. Claimant reached out and caught the drum with his left arm. He felt pain in his left arm, left shoulder and neck. He said his left arm at first "went dead" and he could not feel it. When he was able to move his arm, he felt pain all the way up.¹ On a scale of 0 to 10, claimant described his pain as being at a level of 9.

Claimant called his supervisor, Jeffrey Owens, to report his injury. Claimant testified he told Mr. Owens that he suffered injuries to his left arm, left shoulder and neck. Mr. Owens told claimant to drive back to respondent's place of business in Wichita, Kansas. Although claimant was experiencing pain in his left arm, he used both arms to drive from Salina to Wichita. He still was having pain he rated as a 9, but he did not stop at an emergency room or urgent care clinic for treatment.

When claimant returned to Wichita, respondent authorized him to be seen by Dr. Romeo Smith for injuries to his left arm and elbow. He saw claimant the same day as the accident. In filling out the patient information form, claimant described the location of his injury as the "left elbow area."² He said by the time he saw Dr. Smith, his pain had decreased from a level 9 to a level 8. The feeling of pins and needles was gone, but he

¹ P.H. Trans. at 9.

² P.H. Trans., Cl. Ex. 1.

felt he could not move his arm completely. Dr. Smith treated claimant with anti-inflammatories and pain medicine. After about five weeks, claimant was referred to Dr. Patrick Do.

Claimant first saw Dr. Do on June 1, 2010. Claimant testified that he told Dr. Do that the majority of his pain was in his left elbow and that he could not raise his arm all the way up. He stated he also told Dr. Do that his left shoulder felt like it was locking, and that he had neck pain and he had limited range of motion when trying to turn his head to the right. He also told Dr. Do that he had headaches on a daily basis. Claimant testified that Dr. Do told him he was only authorized to treat the left arm and could not treat him for his neck or shoulder conditions. Dr. Do's note of this visit does not indicate that claimant made any complaint about his neck or left shoulder.

Claimant saw Dr. Do again on June 15, 2010. Claimant testified he again told Dr. Do about the pain in his left shoulder and neck. Again, Dr. Do's office note of this visit does not indicate that claimant made any complaint about his neck or left shoulder. Claimant said Dr. Do told him he would have his assistant make a telephone call to see if he could be authorized to treat those conditions.

Claimant returned to Dr. Do's office on July 12, 2010. At that time, he was seen by Tammy Harper, a registered nurse practitioner. The office note of that date states: "[Claimant] reports that he continues to have pain to the left shoulder and neck, he states that this pain started at the time of injury and that he reported it to 'the work comp doctor.'"³ Claimant has not been back to Dr. Do's office since July 12. He is still having complaints in the area of his neck and left shoulder.

Other than physical therapy, Dr. Do has not referred claimant to any other medical provider for treatment of his injuries sustained on April 23, 2010. From April 23, 2010, to July 12, 2010, claimant had not been to the emergency room or seen his family doctor about problems he has been having with his left arm, shoulder or neck, even though he said his left shoulder pain was a level 8 or level 6 during that time and his neck pain was consistently at a level 8. After the July 12, 2010, visit to Dr. Do's office, he stated the majority of the pain in his forearm has subsided and the only time he feels pain in that area is in the mornings when he first wakes up. The symptoms in his left shoulder and neck have gotten worse.

Jeffrey Owens, respondent's plant manager and claimant's supervisor, testified that he had conversations with claimant on April 23, 2010. In the first conversation he had with claimant after the accident, claimant had called him and said he had a pain in his left arm. Mr. Owens said claimant said he did not know what he did, but the arm hurt. Claimant did not say he had hurt any other part of his body. When claimant returned from Salina,

³ P.H. Trans., Resp. Ex. 2 at 3.

Mr. Owens spoke with him a second time. During the second conversation, claimant told him that he had been injured while rolling a drum of antifreeze. Mr. Owens said claimant did not mention injuring his left shoulder or neck during that second conversation. Neither did claimant report to him that he had injuries to his left shoulder or neck during a third conversation held after claimant's visit to Dr. Smith when claimant returned with restrictions. Mr. Owens admitted on cross-examination, though, that it was his intent to take claimant up to personnel to handle his paperwork, and he did not stick around to ask claimant questions about what the doctor said.

PRINCIPLES OF LAW

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2009 Supp. 44-551(i)(2)(A) states in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534a(a)(2) states in part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

In *Allen*,⁴ the Kansas Court of Appeals stated:

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and

⁴*Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.⁵ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁶

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.⁷

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁸ Moreover, this review of a

⁵ K.S.A. 2009 Supp. 44-501(a).

⁶ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

⁷ *Id.* at 278.

⁸ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. ___, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁹

ANALYSIS

On appeal from a preliminary hearing order, the Board has jurisdiction to review a disputed issue of whether claimant suffered an accidental injury and whether an injury arose out of and in the course of the employment. Respondent admits that “[o]n April 23, 2010, the claimant sustained personal injury while moving a drum of antifreeze in Salina, Kansas.”¹⁰ And respondent does not dispute that claimant injured his left elbow in that accident. Respondent, however, denies that claimant injured his left shoulder or neck in that accident. As such, there are disputed issues of whether claimant suffered injury to his left shoulder and neck as a result of the admitted accident and whether those injuries arose out of and in the course of claimant’s employment with respondent. The Board, therefore, has jurisdiction of the issues raised in this appeal.

Claimant testified that he immediately experienced pain in his left shoulder and neck in addition to his left elbow as a result of his accident on April 23, 2010. The early medical treatment records and Mr. Owens’ testimony do not support claimant’s testimony. Nevertheless, the SALJ, who had the opportunity to personally observe the witnesses testify and judge their credibility, apparently found claimant’s testimony to be credible because he specifically awarded claimant preliminary benefits for all three injuries. Eventually, Dr. Do did seek authority from respondent to treat claimant’s left shoulder and neck. Also, Mr. Owens acknowledged that he did not question claimant about the extent of his injuries and symptoms.

This Board Member finds that claimant has had symptoms in his left shoulder and neck since the accident of April 23, 2010. The mechanism of the admitted injury to claimant’s elbow, attempting to move a 700 to 800 pound barrel which started to fall and catching it with his left hand, is consistent with his complaints of injury to the left shoulder and neck. There is no contrary explanation for claimant’s symptoms. For purposes of preliminary hearing and based on the record presented to date, this Board Member finds the SALJ’s Order should be affirmed.

CONCLUSION

(1) The Board has jurisdiction of the issues in this appeal.

⁹ K.S.A. 2009 Supp. 44-555c(k).

¹⁰ Respondent Brief at 2 (filed Aug. 26, 2010).

(2) Claimant suffered personal injury by accident to his left shoulder and neck, in addition to his left elbow, that arose out of and in the course of his employment with respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Special Administrative Law Judge E.L. Lee Kinch dated August 3, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October, 2010.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
William G. Belden, Attorney for Respondent and its Insurance Carrier
E.L. Lee Kinch, Special Administrative Law Judge
John D. Clark, Administrative Law Judge